

SERVICE DATE – JULY 10, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34797

NEW ENGLAND TRANSRAIL, LLC, d/b/a
WILMINGTON & WOBURN TERMINAL RAILWAY
—CONSTRUCTION, ACQUISITION AND OPERATION EXEMPTION—
IN WILMINGTON AND WOBURN, MA

Decided: June 29, 2007

In this decision, we find that, under its proposal, New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway (NET or petitioner) would, if authorized, become a rail carrier subject to the Board's jurisdiction. However, we find that some of its planned activities related to the handling of construction and demolition debris (C&D) would extend beyond the scope of rail transportation and therefore would not come within the Federal preemption from most state and local laws provided in 49 U.S.C. 10501(b).¹

OVERVIEW

In this decision, we address the preliminary issue of the extent to which NET's planned activities related to municipal solid waste (MSW) and C&D would come within the scope of the Board's jurisdiction. NET's project is controversial for a number of reasons having little to do with the Board's jurisdiction: the troubled history of the site, which is a notorious, environmentally contaminated "Superfund" site; nearby residents not wanting to live near a rail transload facility; and competing waste handling businesses not wanting more competition. Some of the controversy, however, is a result of the fact that Board jurisdiction over transportation by rail carriers preempts most state and local regulatory actions, including siting and zoning.

Particularly where commodities that have the potential to create health and safety concerns are involved, we are mindful of the consequences of our jurisdiction. In this decision,

¹ Section 10501(b) gives the Board exclusive jurisdiction over "transportation by rail carriers," including related facilities and activities that are part of rail transportation. See 49 U.S.C. 10102(9). Rail operations are also protected by the Commerce Clause of the U.S. Constitution from state or local interference. However, railroads are not entitled to Federal preemption to the extent they are engaged in activities that are not part of transportation.

we have taken an especially hard look at each planned activity of NET to determine whether it would be part of rail transportation. We emphasize that, even as to those activities that are part of rail transportation, the states' police powers are not preempted entirely. Moreover, where there are overlapping Federal statutes, such as the Solid Waste Disposal Act (SWDA) as amended by the Resource Conservation and Recovery Act (RCRA), the Federal statutes are to be harmonized so that each is given effect where possible. The state and local police powers, combined with continuing STB and other federal oversight, should enable commerce to use the interstate rail network freely, while still protecting public health and safety. But what our statute does not permit, in this or any other case, is to have different legal standards for what is part of rail transportation based on the particular commodity involved.

We are not free to find, as some opponents of this project have urged, that no handling or storage of any kind is part of "transportation." To the contrary, our statute defines the term "transportation" broadly to encompass the facilities used for and services related to the movement of property by rail, expressly including "receipt, delivery," "transfer in transit," "storage," and "handling" of property. 49 U.S.C. 10102(9). Thus, under our statute, "transportation" is not limited to the movement of a commodity while it is in a rail car, but includes such integrally related activities as loading and unloading material from rail cars and temporary storage. Accordingly, the courts and the rail industry have consistently understood that transloading operations are part of rail transportation. For us to attempt to suggest otherwise here could have far-reaching, disruptive implications for a host of other commodities (such as lumber, cement, brick, stone and automobiles) for which rail carriers often perform transloading at the starting or ending point of the rail component of the movement.

Our decision today is only a preliminary finding as to the scope of our jurisdiction. There are still many steps to be taken before we will decide whether to authorize NET to provide the proposed rail service. We must first await (1) further evidence from the parties on the merits of this proposal; (2) the relevant portions of the remedial investigation and feasibility study (RI/FS) being conducted by the United States Environmental Protection Agency (EPA) regarding the site on which NET proposes to build and operate its rail line; and (3) the results of the Board's own environmental review under the National Environmental Policy Act (NEPA). Only after we have all of this information in hand will we be in a position to determine whether NET's proposal to provide rail transportation at this site is in the public interest.

BACKGROUND

NET seeks authority from the Board to acquire 1,300 feet of existing track, construct 6,200 feet of new track, and operate as a rail carrier over the combined 7,500 feet of track on and adjacent to a parcel of land owned by the Olin Corporation (Olin) located in Wilmington and Woburn, MA, approximately 12 miles from downtown Boston.² The site contains a Y-shaped

² The Board authority that NET seeks is an exemption pursuant to 49 U.S.C. 10502 from the regulatory approval requirement of 49 U.S.C. 10901. In a decision served on March 3, 2006, (continued . . .)

set of tracks that was formerly used to service Olin's chemical manufacturing operations. NET plans to rehabilitate the existing track on the property and to construct new sections of track to support and facilitate its operations at the site. NET plans to transport traffic by rail for approximately 1 mile and then interchange the traffic with connecting carriers that would continue the movement of the rail cars to their destination. Specifically, NET intends to enter into an interchange agreement with the Boston & Maine Railroad Company (B&M), which has connecting track along the west side of the property. NET also proposes to enter into a separate interchange agreement with the Massachusetts Bay Transportation Authority (MBTA), which has connecting tracks to the east of the site.

NET has stated that the possible commodities that it would transport by rail include sand, gravel, plastic resins, plastic pellets, liquids, rock salt, aggregates, woodchips, coal fly ash, soda ash, liquefied natural gas, corn sweeteners, vegetable oil, biofuels, coal, lumber, construction stone, sheet metal, cosmetic products, MSW, and C&D.³ NET estimates that it would have 30 to 40 rail carloads of traffic per day.⁴

In its December 2005 petition, NET stated that it planned to construct a facility at the Olin site to conduct certain activities, including segregating large pieces of wood and metal from the C&D and then shredding the C&D, and baling some of the MSW it planned to receive by truck. NET would then load those materials onto rail cars or into containers that would then be loaded onto rail cars for transport to NET's connection with B&M or MBTA. NET argues that all of these activities would facilitate the transportation of the MSW and C&D, and therefore would be integrally related to rail transportation and preempted from most state and local regulation pursuant to section 10501(b).

Throughout this proceeding, opposing parties have argued that some or all of these activities would not be part of rail transportation, as they are no more than routine solid waste management and processing activities. Accordingly, on April 27, 2006, a coalition of parties headed by National Solid Wastes Management Association (NSWMA) asked the Board to address the threshold issue of the extent of this agency's jurisdiction over the project.⁵

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the Board instituted a proceeding pursuant to 49 U.S.C. 10502(b) to consider NET's request for Board authorization.

³ No one has argued that NET's transloading of commodities other than MSW and C&D would not come within the scope of rail transportation.

⁴ Transcript of April 19, 2007 oral argument (TR) at 144. In its December 2005 petition, NET estimated that it would initially generate 15 rail carloads per week, and would operate one train daily, up to 6 days per week, for a total of approximately 300 trains per year.

⁵ In addition to NSWMA, the coalition includes Solid Waste Association of North America (National and Massachusetts chapters), Massachusetts Municipal Association, (continued . . .)

By letter dated May 11, 2006, EPA informed the Board that the Olin site, including the portion on which NET would operate, had been formally added to the “National Priorities List” under the Comprehensive Environmental Response, Compensation and Liability Act (Superfund law). EPA suggested that, in order to fully address the proposal’s effect on potentially contaminated soil and groundwater, the Board defer issuing even a preliminary analysis under NEPA, 42 U.S.C. 4321-43, of the potential environmental impacts of the NET project until EPA has completed the relevant portion of its RI/FS of this Superfund site.⁶

In a decision served on June 13, 2006, the Board agreed to first examine the extent to which NET’s planned activities related to MSW and C&D would come within the scope of the Board’s jurisdiction. The Board sought comments from all interested parties, and we received written comments and replies from numerous parties.⁷ Most argued in their written comments that NET’s planned activities for MSW and C&D would constitute waste processing that is not integrally related to transportation and thus would be beyond the scope of the Board’s jurisdiction. Some commenters also contended that NET would not be a rail carrier.

NET responded that it would operate as a common carrier and asserted that all of its proposed activities, including its activities involving MSW and C&D, would be conducted for the sole purpose of facilitating rail transportation and would therefore be integrally related to that rail transportation. AAR asserted that transloading has historically been an integral part of

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Construction Materials Recycling Association, Integrated Waste Services Association, New Bedford Waste Services, LLC (NBW) (collectively, the Coalition Parties).

⁶ The Board received a further letter from EPA on April 6, 2007, reiterating that suggestion.

⁷ Those parties are: NET; Massachusetts Department of Environmental Protection (MassDEP) and Massachusetts Attorney General’s Office (MassAG) (collectively, Massachusetts); G. Steven Rowe, Attorney General of the State of Maine; John D. Fitzgerald, United Transportation Union – General Committee of Adjustment (UTU–GCA); Massachusetts State Representative James R. Miceli (Representative Miceli); New Jersey Department of Environmental Protection (NJDEP) and New Jersey Meadowlands Commission (NJMC); Ohio Environmental Protection Agency; Illinois Environmental Protection Agency; Raritan Baykeeper, Inc. and Hackensack Riverkeeper, Inc. (RBI/HBI); New York, Susquehanna and Western Railway Corporation (NYS&W); Association of American Railroads (AAR); City of Woburn, MA; Idaho Department of Environmental Quality; Coalition Parties; Susan Cleaver; City of Middletown, NY; CSX Transportation, Inc. (CSXT) and Norfolk Southern Railway Company (NS); Colorado Department of Public Health and Environment; and Town of Wilmington, MA (Wilmington).

railroad operations and that railroad transloading activities often include processes that could also occur at non-rail facilities.⁸

On April 19, 2007, the Board held a full day of oral argument to further explore these issues.⁹ NET's representatives provided additional information about the nature of NET's proposal. They stated that neither NET nor any of its principals or affiliates would be the shipper or receiver of commodities at the facility or earn any revenue from the shredding or baling of any material.¹⁰ They maintained that NET's proposed activities involving MSW or C&D would not add value to those commodities; rather, all of the activities would facilitate the loading of the rail cars, prevent damage to rail cars, and improve the safety of rail transportation by evenly distributing weight within the cars.¹¹ They stated that any large pieces of metal or wood that would be separated from the C&D before shredding would be loaded into the rail cars on top of the shredded materials.¹²

According to NET's representatives, the Olin facility would not be used for recycling wood or metal, even though that can be a significant source of revenue for solid waste facilities.¹³ They maintained that the shredding of the C&D would be done to reduce the materials to a reasonably uniform size, about 2 feet in length, which could then be easily moved by conveyor belt into the rail cars.¹⁴ They explained that the baling and wrapping that would take place would allow MSW to be transported in a wider variety of rail cars and would allow more efficient use of the cars.¹⁵

⁸ AAR offered as examples the sampling, weighing, and mixing of coal from different sources, or the blending of petroleum-coke on site for a particular sulphur content during transload operations. See also TR at 134-35 (summarizing the statements submitted by NS and CSXT describing processes such as inspection of truck chassis, installation of tires or batteries, and spot repairs that take place at transload facilities).

⁹ The participants at the oral argument included United States Senator Frank R. Lautenberg of New Jersey; NET; NYS&W; Frank S. DeMasi of Wellesley, Massachusetts; Representative Miceli; MassAG; MassDEP; NJDEP; NJMC; Coalition Parties; NBW; Wilmington; the Wilmington–Woburn Collaborative (WWC); Susan Cleaver of New York; RBI/HRI; and UTU–GCA.

¹⁰ TR at 40-41.

¹¹ TR at 40.

¹² TR at 41.

¹³ TR at 140, 156, 222-23, 488. In response to questions as to why NET would not recycle, NET stated that it would have no space for that and that recycling was not part of its business plan. TR at 156.

¹⁴ TR at 138, 475.

¹⁵ TR 141-42, 147.

Finally, NET's counsel emphasized that a finding that all of these activities are integrally related to rail transportation and come within the scope of the section 10501(b) preemption would not result in a "regulatory gap" because Federal environmental laws and state health and safety regulations that do not unreasonably burden interstate commerce would continue to apply.¹⁶ He stated that NET stands ready to meet with state and local authorities to assure appropriate state and local oversight of the Olin facility consistent with judicial and Board precedent interpreting section 10501(b).¹⁷

Counsel for NYS&W pointed to the need for uniform national application of laws affecting interstate commerce.¹⁸ Frank DeMasi, a citizen advocate for rail freight transportation, stated that there is high demand for a rail transload facility such as the one proposed by NET because it would be located close to the Boston metropolitan area, and it would have easy access to two of the region's major interstate highways.¹⁹ He argued that NET's facility would fill a gap left by the larger railroads.²⁰ He expressed his view that bringing in solid waste by truck, dumping it onto a cement floor, scooping or bundling it up and putting it into a rail car would all be integrally related to rail transportation.²¹

A representative from WWC, as well as Susan Cleaver, a concerned citizen, argued that NET's proposal was ill suited for the Olin site due to the amount of contamination on this Superfund site.²² A representative from MassDEP expressed concern that, while the Board would conduct an environmental review of this project under NEPA, Board staff might not be equipped to perform necessary inspection and monitoring and to enforce the environmental conditions that the Board might impose on the carrier's operations.²³

A representative for RBI/HRI argued that the section 10501(b) preemption should not apply to facilities that handle solid waste.²⁴ A number of others, including Representative Miceli and participants from New Jersey, expressed concern about misuse of the section 10501(b) preemption in cases where solid waste facilities locate near railroad lines and claim to be rail

¹⁶ TR at 31, 108-12.

¹⁷ TR at 112, 160-62.

¹⁸ TR at 52.

¹⁹ TR at 70.

²⁰ TR at 72.

²¹ TR at 80-81.

²² TR at 424-26, 432-34.

²³ TR 244-46.

²⁴ TR at 441.

transloading facilities in order to evade state requirements that would otherwise apply.²⁵ Some participants noted that, in some instances, there have been claims that even state and local public health and safety laws such as fire suppression laws are preempted.²⁶

Initially, the representative for MassAG took the position that all of NET's proposed operations would constitute solid waste processing beyond the Board's jurisdiction.²⁷ In response to questions, however, she and various other participants—including the representative for NJDEP, and an owner of a solid waste processing facility appearing for the Coalition Parties—conceded that the loading and unloading of all of the commodities at issue here, as well as their temporary storage awaiting loading, would be integral to transportation and covered by the section 10501(b) preemption.²⁸ The solid waste processing facility owner further explained that at his facility, MSW is baled and/or wrapped solely for transportation reasons: to allow the use of rail cars that may then be used for other commodities and to reduce concerns about lingering odor or residue on the rail cars.²⁹ However, these participants were skeptical of NET's claim that it would not recycle or resell the metal and wood that it would separate out at the facility and shred; they explained that NET's argument that it would put the sorted and shredded materials back on rail cars strained credulity, given the high economic value of these materials.³⁰

Finally, counsel for UTU–GCA argued that the Board should not find that NET would be a rail carrier.³¹

DISCUSSION AND CONCLUSIONS

Before turning to the specific issues before the Board here, we will briefly summarize the case law on the section 10501(b) preemption.

The Scope of the Section 10501(b) Preemption

The Interstate Commerce Act has long been recognized as “among the most pervasive and comprehensive of federal regulatory schemes.”³² However, prior to 1995, the states were allowed to control the construction or removal of ancillary track such as “spur,” “industrial,” or

²⁵ TR at 210, 253-54, 259-60.

²⁶ TR at 252-53, 284-85.

²⁷ TR at 308-09.

²⁸ TR at 312-13, 323, 335, 385, 389-90.

²⁹ TR at 382-84.

³⁰ E.g., TR 240.

³¹ TR at 467.

³² Chi. & N. W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981).

“switching” track.³³ In the ICC Termination Act of 1995 (ICCTA),³⁴ Congress broadened the express Federal preemption, making the Board’s jurisdiction “exclusive” for all rail transportation and rail facilities that are part of the national rail network—including even the ancillary track. Section 10501(b) also expressly provides that “the remedies provided under [49 U.S.C. 10101-11908] are exclusive and preempt the remedies provided under Federal or state law.” The purpose of the Federal preemption is to prevent a patchwork of local and state regulation from unreasonably interfering with interstate commerce.³⁵

Section 10501(b) shields railroad operations that are subject to the Board’s jurisdiction from the application of many state and local laws. Two broad categories of state and local actions have been found to be preempted regardless of the context or rationale for the action: (1) any permit requirement that could be used to deny the railroad the ability to conduct its operations or to proceed with activities the Board has authorized,³⁶ and (2) any attempted regulation of a matter directly regulated by the Board, such as a state statute dictating when a train can traverse a road crossing,³⁷ or a state or local regulation determining how a railroad’s

³³ See Ill. Commerce Comm’n v. ICC, 879 F.2d 917 (D.C. Cir. 1989) (addressing the prior statutory scheme).

³⁴ Pub. L. No. 104-88, 109 Stat. 803 (1995).

³⁵ See H.R. REP. NO. 104-311, at 95-96 (1995), as reprinted in 1995 U.S.C.C.A.N. at 807-08.

³⁶ See Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005) (Green Mountain) (preconstruction environmental and land use permitting requirements preempted for transload facility because otherwise the locality could delay the process indefinitely or deny the carrier the right to construct facilities or conduct operations); City of Auburn v. United States, 154 F.3d 1025, 1029-31 (9th Cir. 1998) (City of Auburn) (environmental and land use permit processes categorically preempted); Joint Petition for Declaratory Order—Boston and Maine Corporation and Town of Ayer, MA, STB Finance Docket No. 33971, slip op. at 8 (STB served May 1, 2001) (Town of Ayer) (state and local permit requirements and environmental review of construction and operation of railroad intermodal facility preempted), aff’d, Boston & Me. Corp. v. Town of Ayer, 191 F. Supp. 2d 257 (D. Mass. 2002); Borough of Riverdale—In re N.Y., Susquehanna & W. Ry., 4 S.T.B. 380, 387-88 (1999) (local zoning and land use constraints on the railroad’s maintenance, use, or upgrading of its lines preempted).

³⁷ See Friberg v. Kan. City S. Ry., 267 F.3d 439, 443-44 (5th Cir. 2001).

traffic should be routed.³⁸ Other state or local requirements are not preempted unless, as applied, they would have the effect of preventing or unreasonably interfering with interstate commerce.³⁹

Even where the section 10501(b) preemption applies, there are limits to its scope. Where there are overlapping Federal statutes, they are to be harmonized, with each statute given effect to the extent possible.⁴⁰ This includes Federal environmental statutory programs that are implemented in part by the states, including the Clean Air Act, the Clean Water Act, SWDA as amended by RCRA, and the regulation of railroad safety under the Federal Railroad Safety Act.⁴¹ Also, as the ICCTA legislative history cited above makes clear, the states' police powers are not preempted entirely. Thus, for example, railroads can be required to comply with some health and safety rules, such as fire and electrical codes.⁴² States and localities also can require a railroad to allow the locality to inspect the facility and to notify the locality of when the railroad is undertaking an activity for which a non-railroad entity would require a permit.⁴³

The Issues Presented Here

The two preliminary issues before us here are (1) whether NET would be a rail carrier and thus require Board authorization for the construction, acquisition, and operation of its rail line, and, if so, (2) whether NET's various activities involving MSW and C&D would be integrally related to rail transportation and thus come within the scope of the Federal preemption in section 10501(b).

To come within the Board's jurisdiction and thus be covered by the section 10501(b) preemption, an activity must constitute "transportation" and must be performed by, or under the

³⁸ See CSX Transportation, Inc.—Petition for Declaratory Order, STB Finance Docket No. 34662, slip op. at 7 (STB served Mar. 14, 2005), reh'g denied, (STB served May 3, 2005), appeal docketed, sub nom. District of Columbia v. STB, No. 05-1220 (D.C. Cir. filed June 22, 2005).

³⁹ See Dakota, Minn. & E. R.R. v. South Dakota, 236 F. Supp. 2d 989, 1005-08 (D.S.D. 2002) (revisions to state eminent domain laws preempted where revisions added new burdensome qualifying requirements to the railroad's eminent domain power that would have the effect of state regulation of railroads), aff'd in part, vacated in part on other grounds, 362 F.3d 512 (8th Cir. 2004).

⁴⁰ See Tyrrell v. Norfolk S. Ry., 248 F.3d 517, 523 (6th Cir. 2001).

⁴¹ See Friends of the Aquifer et al., STB Finance Docket No. 33966, slip op. at 5 (STB served Aug. 15, 2001).

⁴² See Flynn v. Burlington N. Santa Fe Corp., 98 F. Supp. 2d 1186, 1189 (E.D. Wash. 2000) (Flynn).

⁴³ See Village of Ridgefield Park v. N.Y., Susquehanna & W. Ry., 750 A.2d 57, 66 (N.J. 2000) (Ridgefield Park); Town of Ayer, supra note 36, slip op. at 9.

auspices of, a “rail carrier.”⁴⁴ The term “transportation” has been defined broadly to include all of the related facilities used and services related to the movement of property by rail, including “receipt, delivery,” “transfer in transit,” “storage,” and “handling” of the property.⁴⁵ Thus, intermodal transloading operations and activities involving loading and unloading materials from rail cars and temporary storage of materials are part of rail transportation that would come within the Board’s jurisdiction.⁴⁶ However, manufacturing and commercial transactions that occur on property owned by a railroad that are not part of or integral to the provision of rail service are not embraced within the term “transportation.”⁴⁷

A “rail carrier” is “a person providing common carrier railroad transportation for compensation”⁴⁸ The term “common carrier” is not separately defined. A common law

⁴⁴ See 49 U.S.C. 10501; Hi Tech Trans, LLC—Petition for Declaratory Order—Newark, NJ, STB Finance Docket No. 34192 (Sub-No. 1), slip op. at 5 (STB served Aug. 14, 2003).

⁴⁵ 49 U.S.C. 10102(9).

⁴⁶ See Green Mountain, *supra* note 36, at 640, 642 (transloading and temporary storage of bulk salt, cement, and non-bulk goods such as steel pipes); N.Y., Susquehanna & W. Ry. v. Jackson, No. 05-4010, 2007 WL 576431, at *18 (D.N.J. Feb. 21, 2007) (C&D storage, transloading, and extraction of materials from waste piles during the loading process), appeal docketed, No. 07-1675 (3d Cir. filed March 16, 2007); Coastal Distribution, LLC v. Town of Babylon, No. 05-CV-2032, 2006 WL 270252, at *6-7 (E.D.N.Y. Jan. 31, 2006) (C&D storage and transloading), *aff’d as modified*, 216 Fed. Appx. 97 (2d Cir. 2007); Canadian Nat’l Ry. v. City of Rockwood, 2005 WL 1349077, at *6 (E.D. Mich. June 1, 2005) (transloading of C&D debris from rail to truck); Norfolk S. Ry. v. City of Austell, 1997 WL 1113647, at *6 (N.D. Ga. Aug. 18, 1997) (transferring containers or trailers of cargo part of rail transportation); Tri-State Brick and Stone of New York, Inc. et al.—Petition for Declaratory Order, STB Finance Docket No. 34824, slip op. at 2, 3 (STB served Aug. 11, 2006) (Tri-State) (unloading rail cars, storing brick and stone products on the ground, and loading those products on customer and common carrier trucks part of rail transportation), *pet. for review pending*, *sub nom.* Tri-State v. STB, No. 06-1334 (D.C. Cir. filed Sept. 22, 2006); Town of Ayer, *supra* note 36, slip op. at 1 (unloading automobiles from rail cars).

⁴⁷ See Fla. E. Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324, 1327, 1336 (11th Cir. 2001) (stockpiling and organizing aggregate by type at rail yard after rail transportation occurs and before loading it onto trucks); Town of Milford, MA—Petition for Declaratory Order, STB Finance Docket No. 34444, slip op. at 2 (STB served Aug. 12, 2004) (Milford) (cutting and welding steel after rail transportation occurs, but before the steel is loaded onto trucks); Growers Mktg. Co. v. Pere Marquette Ry., 248 I.C.C. 215, 227 (1941) (providing for the display and sale of perishable produce delivered by rail); see also Hi Tech Trans, LLC – Petition for Declaratory Order—Hudson County, NJ, STB Finance Docket No. 34192 *et al.* (STB served Nov. 20, 2002, and Aug. 14, 2003) (truck-to-truck transloading of C&D prior to being delivered to rail).

⁴⁸ 49 U.S.C. 10102(5).

term that predates the Interstate Commerce Act, it refers to an entity that holds itself out to the general public as engaged in the business of transporting property from place to place for compensation.⁴⁹ The fundamental test of common carriage is whether there is a public profession or holding out to serve the public.⁵⁰

Whether a particular activity constitutes transportation by a rail carrier is a fact-specific determination.⁵¹ Thus, our findings here are limited to the facts of this case.

NET Would Be A Rail Carrier.

NET plans to transport a variety of different materials for the shipping public, operating its own trains with its own locomotive operated by its own employees to a connection with other carriers. It plans to offer its service to the general public in its own name and not on behalf of any other carrier.⁵² Accordingly, it would be a rail carrier subject to Board jurisdiction.

Some commenters and participants at the oral argument wrongly suggest that NET nevertheless ought not be considered a rail carrier subject to the Board's jurisdiction because NET's length of haul would be relatively short (approximately 2 miles). The length of the track involved is pertinent only to an analysis of whether particular track can be categorized as ancillary "spur" or "switching" track that would not require Board authorization to construct. Here, because this would be the only track operated by NET, it would not be ancillary to another NET track. NET would thus need prior Board authorization in order to construct, acquire, or operate this track.⁵³

⁴⁹ See Washington ex rel. Stimson Lumber Co. v. Kuykendall, 275 U.S. 207, 211-12 (1927).

⁵⁰ B.J. Alan Co. v. ICC, 897 F.2d 561, 563 (D.C. Cir. 1990); Fla. Power & Light Co. v. FERC, 660 F.2d 668, 674 (5th Cir. 1981); see also Am. Orient Express Ry. v. STB, No. 06-1077 (D.C. Cir. Apr. 20, 2007).

⁵¹ See, e.g., Tri-State, *supra* note 46, at 3.

⁵² These facts distinguish this situation from cases such as Milford, *supra* note 47, slip op. at 3 (where the entity involved would not provide transportation, but would only operate a transloading facility in a rail yard pursuant to an agreement with the rail carrier for non-exclusive use of the yard) and Hi Tech Trans, LLC v. New Jersey, 382 F.3d 295, 308-09 (3d Cir. 2004) (where the entity involved merely loaded cargo from trucks onto rail cars via a licensing agreement with a rail carrier).

⁵³ See United Transp. Union—Ill. Legislative Bd. v. STB, 183 F.3d 606, 613-14 (7th Cir. 1999), *aff'g* Effingham Railroad Company—Petition for Declaratory Order—Construction at Effingham, IL, STB Docket No. 41986 *et al.* (STB served Sept. 18, 1998), and Effingham R.R.—In re Construction at Effingham, IL, 2 S.T.B. 606 (1997); Kaw River Railroad, Inc.—Acquisition and Operation Exemption—The Kansas City Southern Railway Company, STB Finance Docket No. 34509 (STB served May 3, 2005); and Bulkmatic Railroad

(continued . . .)

Finally, even if this could somehow be treated as ancillary track in NET's hands, that would not affect NET's status as a rail carrier. Under 49 U.S.C. 10906, it would not require Board authorization for operation and construction of "spur, industrial, team, switching, or side tracks." In enacting ICCTA, Congress broadened the Federal preemption provision contained in 49 U.S.C. 10501(b) to specifically apply to the acquisition, operation and construction of spur tracks. Those activities would therefore nevertheless be preempted from state regulation. Because they would also be excepted by section 10906 from Board licensing, the Board would not undertake any environmental review of the proposed service and could not impose any conditions for the protection of the environment.

Coalition Parties and Massachusetts have suggested that NET is not equipped to become a carrier because it does not have an interchange arrangement with either MBTA or B&M. They argue that such an arrangement is a predicate for NET to be able to provide rail service.⁵⁴ NET has responded that it intends to acquire the necessary equipment, hire the railroad personnel, and execute agreements with B&M and MBTA at the appropriate time.

NET is not now a rail carrier, but should we decide to grant it the necessary authority to become a rail carrier, connecting carriers would then be required to provide for the interchange of traffic from NET. See 49 U.S.C. 10742. Thus, it does not matter that no interchange agreement is yet in place.⁵⁵

NET's Planned Activities.

According to NET, the proposed project would be developed on about 30 acres of the 53-acre Olin site, with different types of commodities handled on different parts of the site. The northern part of the site would be used to transload the liquid commodities (such as corn syrup) and pumpable dry materials (such as plastic pellets) that NET would handle. Two new tracks are proposed to be constructed in the northern area of the property to facilitate this transloading operation.

(. . . continued)

Corporation—Acquisition and Operation Exemption—Bulkmatic Transport Company, STB Finance Docket No. 34145 et al. (STB served Nov. 19, 2002).

⁵⁴ Massachusetts and NJDEP also have noted that NET has not yet hired engineers or other rail employees, nor has it acquired a locomotive or other equipment necessary to conduct rail operations.

⁵⁵ It would be premature at this point for NET to acquire the necessary equipment and personnel for rail operations, given the fact that we will not be making any determination on its request for authority for some time. As discussed below, we do not plan to complete the necessary environmental review until EPA has supplied us with additional information regarding the site.

The western area is where bulk materials (such as lumber, salt, sand, gravel, soda ash, aggregates, and woodchips) would be handled. Some of these materials might be stored temporarily on an asphalt cap before being loaded into rail cars, and three new tracks are proposed to allow trains to access the storage area.

Finally, the C&D and MSW, along with other commodities that need protection from the elements, would be handled in an enclosed transloading structure that would be located in the central area of the property. Cranes, forklifts and conveyor belts would be used to load C&D and MSW into rail cars that would enter and exit this transload facility on the new railroad tracks that would be constructed.

The C&D would be unloaded from trucks onto the concrete floor of the facility, where it would be inspected to ensure that it is consistent with the terms of the bill of lading and that it contains no hazardous waste. Certain metal, wood, and other materials that could damage the loading equipment or rail cars would be segregated and, if it could not be satisfactorily transported by rail, returned to the shipper. The remaining C&D would be conveyed to shredders that would reduce it to pieces approximately 2 feet in length, which would then be loaded into rail cars via conveyor belts.

Trucks delivering MSW would enter on the southern side of the facility, where a recessed concrete area would be located. The MSW would arrive in three forms: (1) in intermodal containers, which would be transferred directly from trucks to rail cars; (2) pre-baled, in which case the bales would be transferred directly from trucks to rail cars; or (3) in bulk form, in which case the bulk MSW would be unloaded from the trucks onto the recessed concrete floor. Bulk MSW would be inspected to ensure that it does not contain hazardous waste or other materials inconsistent with the bill of lading. Then it would be either loaded into containers that would be covered and lifted onto rail cars or baled and loaded onto rail cars. Some of the bales would be further wrapped in plastic, depending on the type of rail car used.

NET argues that all of its proposed activities would facilitate rail transportation. With respect to the baling and/or wrapping activities, NET states that they would make the transportation of solid waste by rail more efficient by eliminating the need to pack MSW forcibly into rail cars or containers, thus minimizing damage to the cars. Baling and/or wrapping also would maximize the amount of material that could be transported in a single rail car and allow the use of various types of rail cars.

With respect to the shredding of C&D before loading it onto rail cars, NET states that this would not be undertaken to create a new product for sale to customers, but only to facilitate loading of the materials onto rail cars for transportation and allow the rail cars to be loaded to their full capacity. NET states that it would not have an ownership interest in the waste materials that it would transport, that it does not plan to create stockpiles of different materials for resale or recycling, and that all of its revenues would be derived exclusively from transloading and other transportation-related activities.

NET does not argue that, without its desired activities, its proposed rail transload operations would be physically impossible or commercially infeasible. To the contrary, it suggests that, if the Board finds that these activities would be beyond the scope of the Board's jurisdiction, NET might instead load MSW and C&D into containers as it receives them.

At the oral argument, a number of the participants opposing NET's proposal acknowledged that at least some of the proposed activities described by NET are the same sort of activities routinely performed at other transloading facilities, including facilities that handle C&D and MSW, and that these activities would directly facilitate the rail transportation of C&D and MSW by rendering that transportation more efficient, more productive, and safer. These include unloading the material onto the floor of the transloading facility, storing it there temporarily until it can be loaded into containers or into rail cars, and loading it into the containers or rail cars. NET could not accomplish its planned rail operations without the ability to first store and then load the waste materials. It is not reasonable to assume that a carrier would maintain sufficient rail cars on hand ready for loading so that all of the MSW or C&D could be immediately and directly transferred onto rail cars or containers without any need for temporary storage. Thus, we conclude that those activities would be integrally related to transportation and therefore would be covered by the section 10501(b) preemption.

NET has also demonstrated that the process of baling and/or wrapping MSW is integrally related to transportation. Baling and wrapping permits a wider variety of rail cars to be used, so those cars would not be limited to hauling MSW.⁵⁶ And baling and wrapping are not the sort of activities that would have value for any other purpose, as upon delivery, any wrapping would be removed and the bales would be broken up.⁵⁷ Therefore, we find that the baling and wrapping activities (including such handling as would be required to prepare the MSW for baling or wrapping) would also be integrally related to transportation. Finally, extracting refrigerators, so as to avoid a legal impediment to the delivery of a shipment at a receiving landfill, would be part of rail transportation and covered by Federal preemption.

NET has failed to persuade us, however, that the shredding it proposes to undertake to reduce the C&D into 2-foot lengths would be integrally related to rail transportation. NET asserts that the purpose of this shredding would be so that it could move the C&D on a conveyer belt for loading onto rail cars. We find that difficult to believe in light of the presentation at oral argument by NBW and others. As the president of NBW explained, his waste processing facility can only justify the cost and other problems associated with shredding equipment⁵⁸ because the shredding (to 2-foot lengths) and use of a conveyer belt enables his company to separate from the

⁵⁶ TR at 60, 141-42, 382-84.

⁵⁷ NET's Oral Argument Exhibits at 29, April 16, 2007.

⁵⁸ According to NBW, "[s]hredders are loud. They create continuous maintenance problems. . . . They have to be fed with a constant stream of material and they use a tremendous amount of electricity. They can also be dangerous." TR at 365.

C&D debris by hand any metal, wood and other valuable materials, which it then resells.⁵⁹ The metal and wood that is removed has significant value.⁶⁰

Given the fact that C&D contains material with considerable value, we find it difficult to believe that NET would do nothing to retrieve that value. In response to questioning at the oral hearing as to why it would not recycle any C&D components, NET replied that it would have no space for that; that recycling was not part of its business plan; and that NET would already be making enough money due to its lower transportation costs.⁶¹ In other words, it claims that it would design a facility with easy access to waste streams and then not capitalize on the opportunity to recycle metal with a value of up to \$50,000 per ton pass by, destined for a landfill.⁶² But businesses rarely forgo significant economic opportunities.

NET did not adequately demonstrate that the shredding activity they propose would be integrally related to rail transportation. As noted at the oral argument, a shredder is not required to pack into rail cars material that has arrived at its facility packed into trucks.⁶³ Additionally, the record indicates that shredding is a common practice in the landfill and waste management businesses and often facilitates recycling.⁶⁴ Nor are we persuaded that the size of the facility would be so large that NET would need to use a conveyer belt just to move waste within the facility for transfer.⁶⁵

For all of these reasons, we find that NET has not met its burden of demonstrating that its proposed shredding activities at the Olin site would be part of rail transportation. Therefore, those activities would not be subject to the Board's jurisdiction or covered by the section 10501(b) preemption. If NET chooses to conduct the shredding activities, they would be subject to the full panoply of state and local regulation.

⁵⁹ As NBW explained, "[c]onstruction and demolition waste can have a high metals content. When a building is demolished, there are appliances, siding, pipes, wires, beams, fixtures, and the like." TR at 362.

⁶⁰ TR at 363.

⁶¹ TR at 156, 486-88.

⁶² See TR at 363, 367-68, 371-72.

⁶³ TR at 366.

⁶⁴ See TR 367-68, 371-72; Verified Statement of Jesse Jeter at 3, Reply of Coalition Parties, Jan. 27, 2006.

⁶⁵ TR at 367.

Further Board Review Under 49 U.S.C. 10502 and NEPA.

This decision is a preliminary one, addressing only the scope of the Board's jurisdiction over NET's proposal. NET would still need Board authorization in order to construct, acquire, and operate these rail lines.⁶⁶ NET has not yet provided evidence to demonstrate that it should be granted that authority. Instead, NET asks that we incorporate by reference the Board's 2004 findings regarding the transportation merits of a prior, different, NET proposal submitted in a previous docket.⁶⁷ That proposal, however, was dismissed (without prejudice) because NET had failed to keep the Board apprised of substantial changes to its plans.⁶⁸ Thus, neither the previous petition nor previous Board decisions related to it can serve as a basis for determining whether NET's current proposal should be authorized. We will afford NET 30 days to submit appropriate evidence of the transportation merits of the current proposal, to the extent found here to be part of rail transportation within the Board's jurisdiction. Any interested party will have 50 days from the service date of this decision to file a reply to whatever NET submits.

In deciding whether to approve an application to acquire or construct a rail line, this agency traditionally looks at whether there is a public demand or need for the proposed new service, whether the proposal is in the public interest and will not unduly harm existing services, and whether the applicant is financially able to undertake the project and provide rail service.⁶⁹ Although NET has sought an exemption from the application process, that does not mean there will not be an appropriate level of regulatory scrutiny. The Board will grant an exemption only if it is satisfied that it has sufficient information about both the transportation and potential environmental aspects of the proposal to be confident that it has no cause for regulatory concern.⁷⁰

⁶⁶ That authorization can be through issuance of a certificate under 49 U.S.C. 10901 or, as requested here, through an exemption under 49 U.S.C. 10502 from the formal application procedures of section 10901. Under section 10502, we are directed to exempt a proposal from the detailed application procedures of section 10901 when we find that: (1) those procedures are not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the proposal is of limited scope or (b) the full regulatory procedures are not necessary to protect shippers from an abuse of market power.

⁶⁷ See New England Transrail, LLC, d/b/a Wilmington and Woburn Terminal Railroad Co.—Construction, Acquisition, and Operation Exemption—In Wilmington and Woburn, MA, STB Finance Docket No. 34391 (STB served Mar. 2, 2004).

⁶⁸ See New England Transrail, LLC, d/b/a Wilmington and Woburn Terminal Railroad Co.—Construction, Acquisition, and Operation Exemption—In Wilmington and Woburn, MA, STB Finance Docket No. 34391 (STB served May 3, 2005).

⁶⁹ See 49 U.S.C. 10901(c); Mid States Coal. for Progress v. STB, 345 F.3d 520, 533 (8th Cir. 2003) (Mid States). Under the statute, there is now a rebuttable statutory presumption that new rail lines and new rail operations should be approved. Mid States, *supra* at 552.

⁷⁰ See 49 U.S.C. 10502(b).

As noted, the Board could not authorize NET's proposal before conducting the environmental review required by NEPA. EPA has asked that the Board await the relevant portions of its RI/FS concerning the property on which NET's track and facilities would be located before issuing a Draft EIS or an EA. In the meantime, Board staff will proceed with any aspects of the environmental review that can be conducted prior to having the results of the RI/FS. Once the RI/FS is issued by EPA, the relevant parts of EPA's findings will be considered in the Board's environmental review. All interested parties, agencies, affected communities and members of the general public will have ample opportunity to participate in the Board's environmental review process and to comment on all aspects of the environmental analysis.

Commenters also can request that specific mitigation measures be imposed, should the Board decide to authorize this proposal, to address any environmental concerns they may have. The Board has broad discretion to impose environmental conditions (including monitoring and/or oversight conditions) on the transactions it authorizes to mitigate potential environmental impacts, including impacts to safety, resulting from the transaction. The Board also has the discretion to fashion conditions that would require NET to allow MassDEP to carry out inspections and to monitor carrier activities to ensure compliance with Board-imposed conditions. Additionally, the Board encourages applicants to propose voluntary mitigation, which can be more far reaching than the mitigation the Board could impose unilaterally. And railroads are encouraged to work with localities to reach reasonable accommodations.⁷¹ As discussed above, NET has already had preliminary discussions with state agencies in Massachusetts and has expressed its desire to negotiate a workable mutually satisfactory agreement regarding acceptable environmental mitigation in this case.

Until the Board's environmental review process is conducted, it cannot be known what environmental mitigation conditions it might be appropriate to impose if the Board decides to authorize NET's proposal. But based on agency practice, the Board's conditions could include, if found to be warranted, continuing oversight of NET's rail-related activities by the Board and periodic reporting by NET during implementation of the project; a requirement that NET comply with specific state or local regulations and any voluntary mitigation;⁷² and monitoring and inspections of NET's rail-related operations at the Olin site conducted by appropriate state agencies, such as the Massachusetts Department of Environmental Protection.⁷³

⁷¹ See Flynn, *supra* note 42, at 1189; Ridgefield Park, *supra* note 43, at 67; Town of Ayer, *supra* note 36, slip op. at 11-12.

⁷² Where the Board itself conducts the environmental review to apply NEPA's requirements, requiring compliance with specific state requirements, or providing for state or local monitoring or inspections of particular operations does not interfere with the Board's jurisdiction.

⁷³ As previously noted, NET's proposed shredding operation would not be part of rail transportation. Therefore, these operations would not be subject to Board jurisdiction. There
(continued . . .)

Only after consideration of the entire record, including both the transportation merits and environmental issues, will the Board decide whether to grant NET the authority it seeks and, if so, what conditions to impose. Any Board authorization to NET would be permissive, not mandatory. But NET would be bound to comply with any environmental conditions the Board might impose in its license if NET decided to go forward with whatever authorization the Board has granted.

In sum, the Board has not yet determined whether to authorize NET's proposed project. Should it ultimately grant authorization, the Board would take into account EPA's RI/FS findings and determinations, along with the Board's own NEPA review. Any resulting environmental mitigation and other conditions that would be imposed would afford extensive safeguards to protect the environment and the public interest. In the meantime, the Board encourages NET and state and local governmental agencies in Massachusetts to make every effort to negotiate a mutually acceptable mitigation plan. The Board stands ready to facilitate these negotiations upon request by NET, Massachusetts and the local governments directly affected by the proposed project.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. NET should submit evidence by August 9, 2007, to demonstrate why it should be granted the authority to construct, acquire and operate the rail lines and rail facilities proposed here that are found here to be within the Board's jurisdiction.
2. Interested parties may reply by August 29, 2007.

(. . . continued)

would be no Federal preemption for these activities. Rather, all state and local regulations that pertain to the shredding of solid waste would apply.

3. This decision is effective on the date of service.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey. Commissioner Mulvey dissented with a separate expression.

Vernon A. Williams
Secretary

COMMISSIONER MULVEY, dissenting:

I strongly dissent from the Board's decision in this case. While it appears that, under 49 U.S.C. 10901 and existing precedent, NET would become a rail carrier if authorized by the Board for its proposed construction and operation of rail lines, I vehemently disagree that its proposed activities with respect to MSW qualify for preemption under 49 U.S.C. 10501(b). Under my reading of the Interstate Commerce Act (the Act) and as a policy matter, I believe that the handling of MSW should be subject to reasonable, non-discriminatory state regulation.

I simply cannot agree with the majority that the unloading of bulk MSW onto the recessed concrete floor of NET's proposed facility, temporarily storing the material, then baling or loading it into containers or railcars (Decision at 13-14) should be accorded preemption, based on the inherent qualities of MSW.¹ What this case comes down to is distinguishing between rail transportation and other activities that would occur even absent rail transportation. NET's proposed activities involving MSW would occur regardless of rail transportation. While these activities might facilitate transportation, they are not *integrally related* to transportation. Extending preemption to shield these handling activities is overreaching and reflects too broad an interpretation of the scope of preemption with regard to MSW.

I have always been — and I remain — a strong supporter of preemption. Congress and the courts have long recognized the need to regulate railroad operations at the federal level to avoid a patchwork quilt of state and local regulations that could impede the efficient flow of commerce. The Act, especially as amended by ICCTA, is one of the “most pervasive and

¹ My experience with the MSW industry and attendant handling and disposal issues spans the past two decades. In the mid-1980s, I was Director of Economic Research for the New York State Legislative Commission on Solid Waste Management. In that capacity, I undertook several economic analyses of the MSW sector and was instrumental in developing an annual Commission-sponsored conference on solid waste management and recycling.

comprehensive of federal regulatory schemes.”² The ability to preempt local laws is one of the prized benefits of receiving Board authority to build and run a railroad. In the rail transportation arena, the purpose of federal preemption is to protect the flow of interstate commerce. In this case, were the Board to authorize NET to operate, I would favor the application of federal preemption to the movement of NET trains to landfills or other waste handling destinations once MSW was loaded onto trains.

The majority states that our statute requires the Board to include handling and storage activities as part of the term “transportation,” and that our statute does not allow us to use different legal standards for different commodities. (Decision at 2) But this ignores the fact that MSW is an atypical commodity. A comprehensive scheme of state and local law exists to protect the environment and the health and safety of local populations in the vicinity of MSW’s handling and disposal. There may be entities that receive, store and reload commodities such as lumber, cement, brick, stone, automobiles and even coal, but I am not aware that these entities operate under state and local regulation because of the inherent nature of those commodities.

There is a critical reason that the power to regulate the handling of MSW has been delegated to the states — and that is because states and localities are in the best position to protect the health and safety of their citizens and to understand the impacts of handling MSW. While the Board typically harmonizes its interpretation and implementation of the Act with other federal laws,³ there is no federal law to be harmonized here precisely because states have the authority and responsibility to regulate in the area of MSW handling.

I am troubled by the recent up-tick in assertions by new entrants into the MSW industry that they are rail carriers subject to the Board’s jurisdiction. What concerns me is these firms’ attempts to blend the nature of their operations to offer both rail carrier service as well as waste processing, and to use their putative status as rail carriers to shield their waste processing operations from the reach of state and local environmental laws. This tactic is manipulative and abusive of the Board’s jurisdiction and powers, and it highlights a method of evading the law that I cannot support.⁴ If the Board’s existing interpretation of the Act cannot stop this practice, then it is time for Congress to do so.

² Chicago & N.W. Transp. v. Kalo Brick & Tile, 450 U.S. 311, 318 (1981); City of Auburn v. United States, 154 F.3d 1025, 1029 (9th Cir. 1998).

³ Tyrrell v. Norfolk Southern Ry., 248 F.3d 517, 523 (6th Cir. 2001); Friends of the Aquifer, STB Finance Docket No. 33966, slip op. at 5 (STB served Aug. 15, 2001).

⁴ Preemption should not be used to jeopardize the public health and welfare. I am concerned about the regulatory gaps that can and do result from preemption, and have been so since I dissented from one of the first cases to come before me after I joined the Board. The New York City Econ. Dev. Corp.—Petition For Declaratory Order, STB Finance Docket No. 34429 (STB served July 15, 2004) (Vice Chairman Mulvey, dissenting). Who looks out for the public health and safety when federal preemption deprives state and local governments from doing so?

I recognize that there may be several subsequent stages to this particular case, and I intend to participate fully in those and to scrutinize the record as thoroughly in the future as I have on the questions presently before us. I foresee potential issues about the bona fides of NET and the Board's ability to adequately condition a grant of operating authority to NET under 49 U.S.C. 10901.

This case is pivotal to the future of the Board's jurisdiction and power to preempt rail transportation activities. I believe the majority has seriously erred in extending the reach of preemption to NET's proposed MSW activities, to the detriment of the Board and communities across the nation. And, we have taken far too long to reach this wrong result. I dissent.